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No. 87-1584

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GELDERMANN, INC., and
BOARD OF TRADE OF THE CITY OF CHICAGO,

Petitioners,

vs.

COMMODITY FUTURES TRADING COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

DONALD P. COLLETON *
JAMES L. FOX
ABRAMSON & FOX
One East Wacker Drive
Suite 3800
Chicago, Illinois 60601
(312) 644-8500

Attorneys for Petitioner,
GELDERMANN, INC.

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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The Commission's counter to Geldermann's petition is misleading and flawed:

1. The Questions Presented Are Wrong.

Though its misleading response belies it, the Commission knows well the question presented by Geldermann's petition is *not* whether the "Commission exceeded its stat-

utory authority or acted arbitrarily in adopting a rule requiring members of the Chicago Board of Trade to arbitrate customers' claims at the customers' option", Brf. in Opp. i, but, whether it did so in requiring members unwillingly to arbitrate customers' *common law* claims unrelated to the Commodity Exchange Act and the agency's Regulations. See Pet. at i, 14-17, 19-21. Geldermann does *not* contest the right of Congress and the Commission to require Board of Trade members to arbitrate customers' claims which arise under rights created by the Act or its Regulations. See *Thomas v. Union Carbide Agricultural Products Co., et al.*, 473 U.S. 568 (1985). It is Geldermann's position that since neither the Congress nor the Commission created the "private" right of FSI to sue Geldermann in *indebitatus assumpsit*, trespass on the case, or on a contract, Pet. at 15-16—a right which existed long before either the Commission or the Congress came to be—adjudication of the right is reserved to an Article III court with a concommitant right to a trial by jury. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

At stake in this petition is not the compulsory arbitrability of "customer claims" in general but rather only of such claims that involve purely common law issues not arising under the Act or the Commission's regulations. The Commission's overly broad statement of the question should not be permitted to obscure or diminish the importance of the real point in contention.

It may well lie within the Congressional power to compel, at the customer's option, a non-jury, non-federal court determination of violations of substantive rights *created by the Commodity Exchange Act, Myron v. Hauser*, 673 F.2d 994, 1001-1004 (8th Cir. 1982); *Rosenthal & Co. v. Bagley*, 581 F.2d 1258, 1261 (7th Cir. 1978) or to permit the Com-

mission to entertain, against the customer's wishes, a common law counterclaim in a reparation proceeding initiated by the customer with knowledge that by so initiating the proceeding he consents to the counterclaim. *Commodity Futures Trading Commission v. Schor*, ____ U.S. ____, 92 L.Ed.2d 675 (1986). Those, however, are not the narrow circumstances Geldermann presents in this case.

2. The Diverse Status Of The Litigants Suffices To Raise The Article III Question.

The Commission contends there is no Article III issue in this case because Geldermann (an Illinois corporation) could not have removed to an Article III court had FSI (a New York corporation) asserted its common law claims in an Illinois court. Brf. in Opp. at 9. Again, those are not the circumstances presented here. FSI has not sued Geldermann in an Illinois court. It has sought to settle common claims before a non-Article III arbitrator against Geldermann's will just as Marathon sought to compel Northern Pipeline to adjudicate common law claims before a non-Article III bankruptcy judge in *Northern Pipeline Co. v. Marathon Pipe Line Co., supra*, 458 U.S. at 56. The existence of a hypothetical fact pattern in which Geldermann would be foreclosed from an Article III forum no more extinguishes the Article III issue here than it did in *Northern*. As the Court of Appeals noted, "actual or potential diversity" exists for Geldermann, App. 22-23, and while Geldermann may not have a constitutional right to have its common law claims adjudicated in a federal court or to remove to federal court in *all* cases, it does have a constitutional right not to be compelled to accept arbitration of its common law claims under the facts presented. Congress was not required to create diversity jurisdiction, *cf. Brunner v. United States*, 343 U.S. 112 (1951), but having done so and, as the Commission con-

cedes, Br. in Opp. at 14, n. 3, having not withdrawn member-customer common law claims from judicial cognizance, it is prevented by Article III from foreclosing litigants like Geldermann and Marathon from invoking it for resolution of those claims.

3. Geldermann's "Real" Claim Is Not Against All Mandatory Arbitration.

The Commission raises another straw man in asserting that Geldermann's "real" claim, Br. in Opp. at 9, is that exchange members have a constitutional right to refuse arbitration. It may be conceded, *arguendo*, that Congress can compel arbitration of certain types of customer disputes such as those arising under the Act. *Cf. Thomas v. Union Carbide Agricultural Products Co., supra*; *Myron v. Hauser, supra.* The claims here, however, do not arise under the Act or its Regulations or under any other category of right for enforcement of which the courts have permitted compulsory arbitration. They involve garden variety common law claims unrelated to matters regulated by the Act and are at the heart of Article III protection.

4. Under The Reasoning Of *Thomas*, Geldermann Has Not Waived Its Right To Assert Its Constitutional Claims.

Thomas may indeed hold that Congress is free to condition a broker's "choice" of being a contract member on its agreement to "non-Article III resolution of *certain* claims" against it (emphasis added). Br. in Opp. at 11-12. But the Commission realizes that the "arcane distinctions", *Northern Pipeline Co. v. Marathon Pipe Line Co., supra*, 458 U.S. at 90, which characterize Article III analysis make clear that the type of claim in issue may determine the constitutionality of the condition. Neither *Thomas* nor any other decision of this Court permits Congress to remit to mandatory arbitration common law claims

wholly unrelated to the subject matter Congress has undertaken to regulate. The implications of such a proposition—adopted by the court below—are far reaching, see Pet. at 26, and must be addressed by this Court as a matter of compelling public interest and constitutional concern.

5. Compulsory Arbitration Of Common Law Claims Offends The Structural Principle Of Article III.

It is not clear how the Commission can seriously argue that Section 5(a)11 does not implicate the structural concerns of Article III when it subjects common law claims unrelated to the Act to compulsory arbitration. Br. in Opp. at 13. The Commission apparently rests this conclusion on its view that only transfers of jurisdiction to non-Article III "*federal*" fora or fora of Congress' "own creation" raise structural concerns and that because Board of Trade arbitration is not a federal forum or one created by Congress, *id.*, the structural interest is not compromised. This view misapprehends the structural consideration. What is proscribed by Article III is an attempt by the Congress to remove from the Judiciary and transfer anywhere matters traditionally tried by the constitutional courts. In the present case, it is the transfer, not the nature of the transferee tribunal which is relevant. This Court did not suggest in *Thomas* that it would have struck down FIFRA if the dispute resolution mechanism had been a Congressionally created administrative tribunal rather than an arbitrator. Similarly, the Bankruptcy Act's transfer of jurisdiction over common law claims to the bankruptcy court would not have been any less assailable in *Northern* had Congress chosen an arbitration panel rather than the bankruptcy court as the transferee tribunal for the traditional jurisdiction of the district court. In *CFTC v. Schor*, *supra*, the outcome did not turn on

the fact that the transferee forum was a Congressionally created administrative body but on the fact that Congress had left it to the parties to decide whether or not to litigate common law claims in a non-Article III forum. The customer did so by invoking the reparations procedure and thereby exposing itself to a common law counterclaim related to the subject of the reparations claim—as a counterclaim authorized by the statute; the member by exercising its right if it so wished to assert its related common law counterclaim which it could as well have asserted in a separate judicial proceeding.

In the present case, against a member's will, Congress has transferred to arbitration a case involving the very subject matter over which the constitutional courts exercise jurisdiction in diversity cases—common law claims. It is hard to see how this transfer does not encroach upon the integrity of the Judiciary and aggrandize the power of Congress. If Congress wishes to withdraw diversity of jurisdiction from the federal courts it may repeal §1332. Having afforded those courts that jurisdiction, however, it may not abridge it by relegating the grist for their mill to non-Article III tribunals.

Respectfully submitted,

DONALD P. COLLETON *
JAMES L. FOX
ABRAMSON & FOX
One East Wacker Drive
Suite 3800
Chicago, Illinois 60601
(312) 644-8500

Attorneys for Petitioner,
GELDERMANN, INC.

* Counsel of Record